86-620

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

In re FRANKLYNN B. ALBERT and JAMES M. P. D'AMICO,
Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND TO THE HONORABLE CIRCUIT JUDGES HARLINGTON WOOD, JR. AND JESSE E. ESCHBACH, OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE HONORABLE WILLIAM J. CAMPBELL, SENIOR DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, SITTING BY DESIGNATION.

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QUESTION PRESENTED

Whether a federal court may ignore, or defer in favor of procedural issues, a question of jurisdiction under Article III of the Constitution of the United States of America when that issue is properly raised by the court *sua sponte*?

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PETITION FOR WRIT OF MANDAMUS

Petitioners respectfully pray that a Writ of Mandamus be granted after review of the opinion of the United States Court of Appeals for the Seventh Circuit entered on June 6, 1986, petition for rehearing with suggestion *en banc* denied July 16, 1986 in Appeal No. 85-1687 entitled *United States General, Inc., v. Franklynn B. Albert and James M. P. D'Amico* directing the Judges of said Court to decide the issues properly before them.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at App. 1a through App. 10a. and the opinion and order of the Honorable Ilana Diamond Rovner, District Court Judge, is reprinted at App. 11a through App. 17a. The judgment order of the Honorable Charles P. Kocoras, District Judge, is reprinted at App. 18a. The order of the Court of Appeals denying the petition for rehearing is reprinted at App. 20a. [1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article III Sec. 2, Clause 1., provides in pertinent part:

> "The judicial Power shall extend to all Cases, . . . arising under this Constitution, the Laws of the United States . . . to Controversies between citizens of different states."

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit reversing the District Court was entered on June 6, 1986 and the order denying the Petition for Rehearing *en banc* was denied on July 16, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1651(a).

STATEMENT OF THE CASE

United States General, Inc., ("USG") filed its complaint on November 21, 1975 against the City of Joliet, Illinois (the "City"), its Mayor, Councilmen, Director of Community Development, Franklynn B. Albert and Corporation Counsel James M. P. D'Amico, alleging that USG was prevented from constructing a particular plan of low-income housing in Joliet because of the actions of the defendants.

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[1] Herinafter, references to the Appendix are designated as "App." with a page number.

No equitable relief is sought; USG does not seek to build any housing in Joliet or to benefit any members of any minority group. Instead, it seeks $1,681,999 in alleged "compensatory damages," $1,000,000 in punitive damages, attorneys' fees and costs. No resident of Joliet has ever sought to intervene in this action.

On April 5, 1977 Judge Prentice Marshall dismissed four of the seven counts, holding that plaintiff lacked standing to bring Counts I, II, and IV, *United States General, Inc., v. City of Joliet et. al.*, 432 F. Supp. 346, (N.D. Ill. 1977), and that it failed to give defendants notice of its claim contained in Count V as required by the Illinois Local Government Tort Immunity Act. *Id.* at 355. In addition, Judge Marshall expressed doubts about the legal bases of Counts VI and VII, *id.* at 350 n. 1 and 355, held that Joliet's Corporation Counsel and Director of Community Development were protected by good faith immunity, *id.* at 354-55 and ruled that the actions of the City might have been within its police power. *Id.* at 355. He denied the motion to dismiss as to Counts III, VI and VII, indicating that further motions to challenge those counts might be appropriate after discovery. *Id.* at 355. USG filed an amended Count V on April 15, 1977 in an effort to correct the notice deficiency. The only pending counts are Counts III, V, VI and VII.

USG engaged in massive discovery, deposing 33 people in over 90 days. Depositions of the nine individual defendants took over 40 days.[2] Accepting Judge Marshall's invitation (432 F. Supp. at 355), after the close of discovery, all defendants filed a motion for summary judgment on all claims. Briefing on that motion was concluded on July 12, 1982.

On September 10, 1982, USG moved for summary judgment on the issue of liability of all defendants on Count III,

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[2] Albert's deposition required 10 working days, D'Amico's required 5 full days.

a claim founded upon the Fair Housing Act. Briefing on that motion was concluded on December 23, 1982.

On January 20, 1984 Judge Kocoras held a status hearing on the motions for summary judgment, asked if there were any discovery disputes pending and when told there were not, indicated his ruling would be issued shortly.

On February 10, 1984 Judge Kocoras granted summary judgment for defendants Albert and D'Amico on all counts stating:

> "Judgment shall be entered in favor of defendants Albert and D'Amico, and plaintiff's demand for punitive damages against the City under Count 3 shall be stricken. In all other respects, the motions for summary judgment are denied." (Judgment Order of 2/10/84 App 18a)

On September 11, 1984 Albert, D'Amico and the City filed a motion for entry of an order of final judgment pursuant to Federal Rule of Civil Procedure 54 (b) which Judge Kocoras granted on October 31, 1984. On November 14, 1984, in response to USG's request for briefing on the certification aspect he vacated his certification order.

The case was reassigned to Judge Rovner who, after further briefing, on March 22, 1985 issued an order directing the entry of final judgment in favor of Albert and D'Amico in accordance with the February 10, 1984 grant of summary judgment. (Mem. Op. & Order of 3/22/85, App. p. 11a) In a footnote, Judge Rovner responded to USG's claim that Judge Kocoras had not granted Albert and D'Amico summary judgment on Counts V and VII by stating unequivocally that: "summary judgment was entered in defendants D'Amico's and Albert's favor on all claims raised in the complaint." (*Id.* App. at p 11a, n. 1)

Plaintiff, USG appealed from the District Court's Judgment to the Court of Appeals for the Seventh Circuit. On June 6, 1986 the Appeals Court dismissed USG's appeal

on the grounds that the lower court abused its discretion in certifying the final judgment awarded Albert and D'Amico because Judge Rovner failed to consider the possibility that the Appeals Court might some day have to consider the issue of the plaintiff's standing to bring the action in the first place noting Judge Marshall's earlier decision.

A petition for rehearing was filed by the appellees requesting the Court of Appeals to consider the question of standing together with the other issues properly before it. Because the court had raised the Article III issue *sua sponte* it was required under Article III, established by legal precedent, to decide the issue. The Court of Appeals refused by denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. MANDAMUS IS THE PROPER REMEDY

The universally recognized purpose of a Writ of Mandamus directed by an appellate to an inferior court is to exert the revisory appellate power over the inferior court; the writ thus affording an expeditious and effective means of confining such court to a lawful exercise of its prescribed jurisdiction, or compelling it to exercise its authority when it is its duty to do so. *Ex parte Republic of Peru,* 318 U.S. 578 (1943), *Roche v. Evaporated Milk Asso.*, 319 U.S. 21 (1943), *United States Alkali Export Asso. v. United States,* 325 U.S. 196 (1945), *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379 (1953), *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976), *Allied Chemical Corp. v. Daiflon,* 449 U.S. 33, (1980). Accordingly, this requirement of 28 U.S.C. Sec. 1651(a) is met; this petition is timely brought requesting this Court to issue the writ under its supervisory power to insure that the administration of justice is properly and uniformly applied and to insure that its prior decisions are correctly enforced in aid of its jurisdiction.

A. PETITIONERS HAVE NO OTHER FORUM

The Court of Appeals agreed with the District Court that the judgment entered in favor of Albert and D'Amico "was a final decision with respect to their liabilities."

It has been held that where there exists a sufficient basis for the complete discharge of a party the court need not address the issue of standing under Article III; *Secretary of Agriculture v. Centra Roig Co.*, 338 U.S. 604 at 619 (1950), *Pan Am. World Airways, Inc. v. C.A.B.*, 392 F.2d 483 at 486 (C.A. D.C. 1968). In view of the foregoing there is no compelling reason for petitioners to raise this issue in the District Court. Moreover, on two separate occasions early in this litigation D'Amico (then attorney of record and *pro se*) attempted to have Judge Marshall's order certified with no success.[3] There is also the question of whether, having been dismissed, they could properly raise the standing issue - apart from the imposition on the court to decide a question which might never arise. (Discussed *infra* under II.) Accordingly, the petitioners have been effectively relegated to the penalty box, there to await the outcome of the issues between the remaining parties.

It is manifestly beyond the scope of this petition to address the propriety of Judge Marshall's ruling on standing; instead, petitioners seek to have the Court of Appeals rule on an issue which it is obligated to decide under the overwhelming body of precedent. (Discussed *infra* under III.) The Appeals Court

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[3] On June 18, 1986 Judge Rovner issued an order requiring the remaining parties to brief the issue of standing apparently in response to the invitation of the Appeals Court expressed in n. 6. of its decision. (App. p. 10a) Because subsequent to Judge Marshall's ruling it was discovered that the plaintiff had little or no interest in the case and that it had been financed and prosecuted on behalf of a lending institution and a mortgage trust, motions were filed by remaining defendants to join these institutions as the real parties in interest in order to present the case in its accurate factual picture should it again reach the appellate level on the issue of standing.

did not reach the propriety of the District Court's grant of summary judgment other than to indicate that it agreed with the opinion and that it was a final resolution of all of the claims against Albert and D'Amico. There is, therefore, no substantive issue ripe for appeal.

B. THERE ARE CIRCUMSTANCES WARRANTING THIS COURT'S DISCRETIONARY POWERS

The stated reason for the Appeals Court's action in dismissing the appeal was in the interest of judicial economy. Ironically, the decision has just the opposite effect. This is not the first time that court has been asked to review Judge Marshall's decision on standing.[4] A decision on that threshold question adverse to the plaintiff would relieve the District Court from a burdensome trial together with the many questions which have and will be raised by the continued pendency of this case in the District Court.[5] While it is not certain that

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[4] Following Judge Marshall's decision the City and all defendants filed a 3 Count counter claim alleging *inter alia* that plaintiff's damages where occasioned by its own illegal plan which was contrary to U. S. Housing & Urban Development guidelines (see HUD Low-Rent Public Housing Turnkey Handbook, June 1969) and unlawfully concentrated public housing contrary to the holding of the Appeals Court's ruling in *Gauteraux v. Romney,* 448 F.2d 731 (C.A. 7 1971). Count 3 of that complaint was dismissed on the grounds that the public officials had no standing to assert the rights of Black Citizens of the City seeking to have public housing dispersed throughout the City in accord with the holding in *Gauteraux.* Immediately preceding the appeal from that dismissal, the District Court was twice requested to certify Judge Marshall's order of April 4, 1977 in order to put the entire question before the Seventh Circuit. The request was refused, June 22, 1978 and on February 9, 1979. USG's standing was argued obliquely without success; the court observing that the question was not before it, *United States General, Inc. v. City of Joliet,* 598 F.2d 1050, (C.A. 7 1979).

[5] At this writing briefing has been completed on the question of USG's standing, however, in order to fully protect remaining defendants their attorneys have sought to join additional parties which

(Footnote continued on the following page)

the Appeals Court's decision on the issue of USG's standing would materially shorten the entire litigation, unless favorable to remaining defendants, judicial economy militates in favor of such review as opposed to the certainty of revisiting the issues before the court in the appeal just dismissed together with the guarantee that by avoiding the issue an additional burden will be placed on an already crowded calendar in the District Court.

II. THE APPEALS COURT'S REVIEW OF CERTIFICATION IS IN CONFLICT WITH THE PRONOUNCEMENTS OF THIS COURT RELATING TO FEDERAL RULE OF CIVIL PROCEDURE 54 (b)

On February 10, 1984 District Court Judge Charles Kocoras granted summary judgment in favor of Albert and D'Amico on all claims raised against them. Pursuant to their request Judge Kocoras certified his grant of summary judgment as a final order on October 31, 1984. On November 14, Judge Kocoras vacated his order at the request of USG on the grounds that it had not been given the opportunity to file a brief in opposition to the certification order, stating: "it may come out the same way, but I did not give them a chance to address that." (App. p. 12a Mem. op. & order of March 22, 1985)

The case was transferred to newly appointed District Judge Ilana Diamond Rovner. After full briefing Judge Rovner began her "discussion" of the issue by setting out *in haec verba* Federal Rule of Civil Procedure 54 (b). Next, Judge Rovner turned to this Court's definitive rulings in *Sears*

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5 *(Continued)*

motions have raised additional issues now before the District Court which will have to be decided before the standing issue is reached. If the District Judge allows joinder, further briefing will probably be necessary on the standing of additional parties. The remaining defendants may well elect to proceed to trial on the merits rather than add to the eleven years during which this case has been pending.

Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) and *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980).

Mindful of the criteria announced in both *Sears* and *Curtis-Wright* Judge Rovner found that the judgments entered in favor of Albert and D'Amico were final, disposed of all claims against them and should be certified under Rule 54 (b). She expressed the following reasons: (*Id.* App. p. 14a)

> This Court finds that the decided claims against Albert and D'Amico are separate and distinct from those remaining in the case because summary judgment was based on qualified immunity defense, and no other parties in the case occupied positions similar to those held by these two defendants. Thus in the event of subsequent appeals, the Court of Appeals would not be required to address identical legal issues.
>
> Further under Rule 54 (b) "the district court should feel free to consider any factor that seems relevant to a particular action." [citing] *Bank of Lincolnwood v. Federal Leasing, Inc.* 622 F.2d 944, 949 (7th Cir. 1980)
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> * * *
>
> Judge Kocoras presided over this case for almost four years and he expended a great deal of time in writing a well reasoned opinion for the cross-motions for summary judgment. As the district Court judge most familiar with the issues and the equities of the case, he initially granted defendants' Rule 54 (b) motion, vacating his order only because of plaintiff's request that it be allowed to brief the issue. *In addition, this case has dragged on for ten years; that it has been handed through five different judges and that it involves a very large damages claim for which plaintiff alleges defendants are individually liable, all bolster this Court's determination that there is no just reason for delay.* [emphasis added]

Among the criteria acknowledged by this Court to be used in determining the propriety of certification under Rule 54 (b) is "justice to the litigants." As observed by Judge Rovner this case has been pending for over ten years. Of the original nine

defendants only eight presently remain alive and several are over sixty years of age. Owing to the policy of providing newly appointed members to the District Court with a docket taken from other judges this case has been assigned to five different judges. Judge Kocoras spent almost two years reviewing the massive record compiled from literally thousands of pages of depositions and other discovery documents dating back to the 1940's.

The Appeals Court did not disturb the grant of summary judgment and expressed agreement on the well reasoned opinion of Judges Kocoras and Rovner holding that the judgments were final. There is also no dispute that the basis upon which Albert and D'Amico were granted summary judgment was unique and would not, therefore, need to be again addressed.

Nevertheless, the Appeals Court dismissed the appeal without deciding the issues presented ostensibly because the lower court abused its discretion in certifying the judgments, in short, because there may, at some future time, exist an additional reason to affirm the judgments.

The action taken by the Court of Appeals completely ignores this Court's admonition in *Curtis-Wright*: *id.* p. 10.

> There are two aspects to the function of a reviewing court in Rule 54 (b) cases. The Court of Appeals must, of course, scrutinize the District Court's evaluation of such factors as the interrelationship of the claims so as to prevent piece meal appeals in cases which should be reviewed only in single units. But once such juridical concerns have been met, the discretionary judgment of the District Court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." [quoting from *Sears*]
>
> * * *
>
> The reviewing courts should disturb the trial court's assessment of the equities only if it can say that

> the judges conclusion was *clearly unreasonable.* [emphasis added]

Given the parameters of "clearly unreasonable" it would seem the Court of Appeals is left in the posture of holding Judge Rovner to a standard under which she was required to anticipate an event to take place [Article III standing review] which even the Court of Appeals concedes may never occur: (*Id.* App. p. 8a)

> To avoid an issue that may become irrelevant, we think the proper course is not to reach the immunity issue now, but rather wait until, *if ever,* [emphasis added] the issue of USG's standing is before this court.

In *Curtis-Wright* this Court unequivocally recognized that even if the criteria of not having to decide the same issues more than once in subsequent appeals is uncertain, this alone does not proscribe the District Court's power to grant certification. *Id.* p. 8 n. 2

> We do not mean that the presence of one of these factors would necessarily mean the Rule 54 (b) certification would be improper. It, would, however, require the district court to find a sufficiently important reason for nonetheless granting certification. For example, if the district court concluded that there was a possibility that an appellate court would have to face the same issue in a subsequent appeal this might be offset by a finding that an appellate resolution of certified claims would facilitate a settlement of the remainder of the claims.

Accordingly, there is certainly a case to be made for Judge Rovner's action; for if she is to be charged with foresight to discern the possibility that the standing issue might reach the appellate level it is equally reasonable to assume she also concluded that resolution of the issue would materially enhance settlement possibilities. A ruling by the Court of Appeals on the standing issue would certainly require the parties to reassess their positions in the light of that decision.

But the thrust of petitioners' argument is that Judge Rovner's action was not only proper under this Court's prior rulings but also required.

The only constraint upon the District Court's discretion is that such courts must take cognizance of judicial administrative interests as well as the equities involved in order to preserve the historic federal policy against piece meal appeals. This has been further refined to mean that the same issue need not be addressed twice on appeal - unless under the circumstances above discussed.

Because the Appeals Court recognized and agreed that Albert's and D'Amico's judgments were final determinations of all claims against them, the Court was only concerned with the immunity issue which it also acknowledged to be different from remaining defendants. It must, therefore, follow that the Court would only meet the immunity issue once since it was unique to Albert and D'Amico. Thus, certification of that issue under this Court's criteria does no violence to historical federal policy.

The only other issue troubling the Court of Appeals and the one which it refused to address was the issue of plaintiff's standing previously addressed by Judge Marshall some nine years ago. The Court concluded that it might have to meet this issue more than once but did acknowledge that it had the power to decide the issue: (App. p. 8a)

> After briefing by the parties we could, of course, rule solely on the standing issue as it relates to Albert and D'Amico and then, if necessary, reach the question of immunity.

Thus, the Appeals Court misapplied the standard and failed to completely understand Article III standing requirements; it assumed that the plaintiff's standing would somehow be altered or differently construed *viz a viz* the particular defendant against whom the claim is brought. Clearly this is a misapplication of Article III.

Early in this litigation D'Amico, then attorney for all defendants and *pro se* filed motions to dismiss under Federal Rules of Civil Procedure 12 (b) (6) and alternately under Rule 56 supported by affidavits and other documents. The rather distorted factual presentation appearing in Judge Marshall's opinion can be traced to his decision to defer ruling on the Rule 56 motion thereby accepting only the allegations of the complaint under the construction suggested by the plaintiff in its briefs; Judge Marshall did not consider any of the supporting affidavits or other materials offered in connection with the motion brought under Rule 54: *id* p. 355 (see also *id.* n. 3.)

> Finally defendants contend that the actions of the Joliet City Council were within its police power. Consideration of this ground is premature. The justification for defendants' actions raises factual issues which should be resolved at trial or at least after discovery.

While the defendants were unhappy with the result the logic is inescapable. The Court of Appeals must decide the standing issue on the same basis Judge Marshall used, namely, from the allegations of the complaint without regard to the veracity of those allegations. Standing is an issue of law going to the jurisdiction of the court over the parties and the subject matter in the light of case or controversy provisions of Article III; it has nothing to do with the identity of the defendants or the presence or absence of culpability or the degree of culpability. The plaintiff either has standing or it does not. Questions of evidence must be left to the trial court as trier of the facts as Judge Marshall pointed out by his invitation to the defendants to renew their motions after discovery.

The issue of plaintiff's standing need be addressed only once in the Court of Appeals on the basis of the allegations and posture of the case as it appeared before Judge Marshall. A decision on that issue adverse to the plaintiff would effectively conclude the litigation.

Accordingly, Judge Rovner's certification order was proper and bottomed on concrete existing issues. No District

Court should have the burden of conjecturing on all future contingencies before granting a Rule 54 (b) motion; to require this would be tantamount to an abrogation of the rule. If there is any doubt about reexamination of issues it would seem justice should come down on the side of the defendants who have been held captive to this lawsuit for ten years.

As will be shown the Court of Appeals abused its discretion in dismissing the appeal without resolving the issues before it.

III. HAVING RAISED THE ISSUE OF ARTICLE III STANDING THE APPEALS COURT WAS OBLIGATED TO DISPOSE OF THE ISSUE

The decision of the Court of Appeals creates a conflict in the law between this Court and all Judicial Circuits of the federal system, including the Seventh Circuit, and the various District Courts which have considered the issue of standing *viz a viz*: the obligations and duties of Federal Courts to decide standing issues under Article III of the Constitution of the United States of America.

In the case of *Jenkins v. McKeitlen,* 395 U.S. 411 (1969) Mr. Justice Marshall recognized that the issue of standing may be reached and determined at any level of a court proceeding, but more, be reiterated a doctrine which has had universal recognition in the federal court system almost from its inception, *id.* p. 421: "since the question of standing goes to this Court's jurisdiction . . . *we must* [emphasis added] decide the issue."

The Seventh Circuit Court of Appeals has also recognized the obligation: *Mayer Paving & Asphalt Co. v. General Dynamics Corp.* 486 F.2d 763, at page 771, (C.A. 7 1973), cert. den. 414 U.S. 1146 (1974): "Lack of subject matter jurisdiction is not waivable [sic] and *must* [emphasis added] be raised by the court of its own motion, Rule 12(h)(3) Fed. R. Civ. P." In almost the identical language used by Justice Marshall the Seventh Circuit exercised similar self discipline in the case of *D'Amico v. Schweiker,* 698 F.2d 903

(C.A. 7 1983); there the Court had no difficulty in confronting the issue involving an appeal by petitioner and six other U. S. Administrative Law Judges seeking to protect their decisional independence and safeguard the due process rights of the parties appearing before them. No cross appeal had been filed but the issue of standing, upheld in the lower court, was argued by the appellees on appeal. The court perceived no procedural constraint in dismissing solely on that basis. *Id.* p. 905:

> Assuming – *as we must* [emphasis added] to bring the question of standing into sharp focus . . .

The affirmative obligation of courts to inquire regarding Article III case or controversy requirements is of long standing and has become virtually axiomatic.

Petitioner cites the following: *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.,* 323 F.2d 290, (C.A. D.C. 1963) reversed on other grounds 379 U.S. 411 (1963), Court of Appeals cases: *Potomac Passengers Ass'n v. Chesapeake & O. Ry. Co.,* 520 F.2d 91, (C.A. D.C. 1975), holding a defect in jurisdiction cannot be ignored; accord: *U. S. v. Anderson,* 464 F.2d 1390 (C.A. D.C. 1972), *Nestor v. Hershey,* 425 F.2d 504 (C.A. D.C. 1969). A Court of Appeals must note a jurisdictional defect *sua sponte*, even though not raised by the adverse party: *Firemen's Ins. Co. of Newark, N. J. v. Robbins Coal Co.,* 288 F.2d 349 (C.A. 9 1961), cert. den. 368 U.S. 875, (1962). The question of subject matter jurisdiction may be raised by the parties at any time or *sua sponte*: *Rath Packing Co. v. Becker,* 530 F.2d 1295 (C.A. 9 1975). It is the duty of the court, trial or appellate, to assure itself it has jurisdiction: *Whitelock v. Leatherman*, 460 F.2d 507, (C.A. 9 1972). Lack of federal jurisdiction may be raised for the first time on appeal even by the party who originally asserted that jurisdiction existed or by the court *sua sponte*: *U. S. for Use and Benefit of D'Agostino Excavators Inc. v. Heyward-Robinson Co.,* 430 F.2d 1077 (C.A. 2 1970), cert. den. 400

U.S. 1021 (1971). Jurisdiction of the Appellate Court may always be inquired into by the court on its own motion if it comes into question: *Stoudenmire v. Braxton,* 299 F.2d 846 (C.A. 11 1962). A court must determine jurisdiction regardless of the inappropriateness of the motion raising the issue: *Thompson v. U. S.,* 291 F.2d 67 (C.A. 10 1961). A Court of Appeals has a duty to satisfy jurisdictional requirements: *Gray v. Swenson,* 430 F.2d 9 (C.A. 8 1970). A court must *sua sponte* dismiss whenever it appears that jurisdiction over the subject matter is lacking: *Thompson v. New York Cent. R. Co.,* 361 F.2d 137 (C.A. 2 1966), accord: *In re Durensky,* 519 F.2d 1024 (C.A. 5 1975). Where there is no jurisdiction over the subject matter there is no discretion to ignore that lack of jurisdiction: *Joyce v. U. S.,* 474 F.2d 215 (C.A. 3 1973). Notwithstanding any procedural limitations the court is duty bound to inquire into any question going to jurisdictional defects: *duPont v. Woodlawn Trustees, Inc.,* 64 F.R.D. 16 (D.C. Del 1974). A Federal Court had a duty on own motion: *In re Butlers Trust,* 201 F. Supp 316 (D.C. Minn 1962) and other District Court cases too numerous to mention.

In the case of *Joyce v. The U. S., id.* it has been established that a court may not ignore lack of jurisdiction and in *duPont v. Woodlawn Trustees, Inc., id.* the court was duty bound to inquire notwithstanding procedural limitations.

The Court of Appeals seeks avoidance of the standing issue on procedural grounds, which is to place the procedural horse [Rule 54 (b)] before the jurisdictional cart [Article III].

For almost eleven years petitioners have had to endure the allegations of invidious racial motivation for their actions which were clearly required by the duties of their offices.

Two District Court Judges have ruled that based upon the claims asserted against Albert and D'Amico judgment was properly entered in their favor as a matter of law. The Court of Appeals would deny petitioners affirmation of the judgments entered in their favor simply because there might be an

additional reason to affirm and wishes to defer any action to a future time.

It has been held that where a court attempts to defer resolution of an issue to another time there must be a very good reason for indulging that preference, if in doing so petitioner's request to be relieved of an onerous legal uncertainty is being refused: *Continental Air Lines, Inc. v. C.A.B.*, 522 F.2d 107 (C.A. D.C. 1974). Petitioners suggest that there is no reason for the Court of Appeals to defer affirming the judgments in favor of Albert and D'Amico and a clear and present duty on that Court to dispose of the Article III standing issue.

CONCLUSION

For the reasons stated petitioners pray this Honorable Court to issue its Writ of Mandamus directed to the Seventh Circuit Court of Appeals and to the Honorable Judges of said Court, Circuit Judges Harlington Wood and Jesse E. Eschbach and Senior District Court Judge William J. Campbell with instructions to decide all of the important issues raised in Appeal number 85-1687 entitled United States General, Inc., v. Franklynn B. Albert and James M. P. D'Amico.

Respectfully Submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1687

UNITED STATES GENERAL, INC.,

Plaintiff-Appellant,

v.

FRANKLYNN B. ALBERT and
JAMES M. P. D'AMICO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 75 C 4002—Ilana D. Rovner, *Judge.*

ARGUED NOVEMBER 7, 1985—DECIDED JUNE 6, 1986

Before WOOD, JR., *Circuit Judge,* ESCHBACH, *Senior Circuit Judge,* and CAMPBELL, *Senior District Judge.**

WOOD, JR., *Circuit Judge.* Plaintiff-appellant United States General, Inc. ("USG"), appeals the district court's grant of summary judgment in favor of defendants-appellees Franklynn B. Albert and James M. P. D'Amico. The district court found that USG's claims against Albert and D'Amico were barred, as a matter of law, because

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

the defendants were immune from suit. Pursuant to Fed. R. Civ. P. 54(b), the district court entered an order of final judgment with respect to these defendants. We dismiss USG's appeal because we find that the district court abused its discretion in ruling that its grant of summary judgment was appealable under Rule 54(b).

I.

This appeal represents only a small part of a much larger lawsuit initiated by USG in November 1975 against the City of Joliet, Illinois, and its mayor, councilmen, Director of Community Development Franklynn Albert and Corporation Counsel James D'Amico. USG, a Wisconsin corporation engaged in the development and construction of housing, alleged that the defendants had unlawfully prevented it from constructing a plan of public housing in Joliet. USG filed a seven-count complaint in the district court seeking relief on a variety of theories for injuries it sustained when Joliet enacted a resolution placing a moratorium on the issuance of building permits for federal housing projects. Counts I, II and IV of USG's complaint, alleging violations of various civil rights statutes and federal constitutional provisions, were eventually dismissed for lack of standing by Judge Prentice Marshall who was then presiding over this action. *United States General, Inc. v. City of Joliet*, 432 F. Supp. 346, 350-54 (N.D. Ill. 1977). Judge Marshall did rule, however, that USG had standing to bring Counts III, V, VI and VII. *Id.* Counts III, V and VII allege, respectively, violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, tortious interference with contractual rights, and violations of Art. I, § 17 of the Illinois Constitution.[1] Count VI involves a claim against the City of Joliet based on promissory estoppel.

[1] Count V was initially dismissed for failure to allege the giving of timely notice as required under the Illinois Tort Immunity Act, Ill. Rev. Stat. ch. 85, ¶ 1-101 *et seq.* USG subsequently amended its complaint to cure this defect.

USG's action was later assigned to Judge Charles Kocoras who ultimately granted summary judgment in favor of defendants Albert and D'Amico on Counts III, V and VII on grounds that they enjoyed qualified immunity from liability. Prior to the entry of final judgment, this case was reassigned to Judge Ilana Rovner.[2] Judge Rovner found that, pursuant to Fed. R. Civ. P. 54(b), the entry of an order of final judgment with respect to defendants Albert and D'Amico was appropriate. The court concluded that such an order was proper since the "decided claims against Albert and D'Amico are separate and distinct from those remaining in the case because summary judgment was based on the qualified immunity defense, and no other parties in the case occupied positions similar to those held by these two defendants." Mem. Opin. at 5. USG appeals from this entry of final judgment.

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[2] Judge Rovner noted that there was a difference of opinion with respect to the extent of Judge Kocoras's grant of summary judgment in favor of Albert and D'Amico. USG argued that summary judgment was ordered only as to Count III. The defendants argued that Judge Kocoras's order of summary judgment applied to all three counts against them. Judge Rovner, after reviewing Judge Kocoras's Memorandum and Order, clarified the matter as follows:

> Judgment was entered in favor of Defendants D'Amico and Albert on Count III because Defendants established, as a matter of law, good faith immunity. Defendants D'Amico and Albert were also granted summary judgment in their favor on Counts V and VII, although for a different reason. On Counts V and VII, defendants D'Amico and Albert were entitled to summary judgment in their favor because defendants established, as a matter of law, qualified good faith immunity under the Illinois Tort Immunity Act, Ill. Rev. Stat. ch. 85, ¶ 1-101, *et seq.* Accordingly, summary judgment was entered in defendants D'Amico's and Albert's favor on all claims raised in the complaint.

Mem. Opin. at 2 n.1 (citations to Judge Kocoras's order omitted).

II.

Although the parties do not raise the issue, because it involves the scope of our appellate jurisdiction, we must consider on our own initiative whether the district court's entry of final judgment is warranted under Rule 54(b). *See Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 701 (7th Cir.), *cert. denied*, 105 S. Ct. 432 (1984); *Landry v. G.B.A.*, 762 F.2d 462, 463 (5th Cir. 1985) (per curiam). If we find that the entry of final judgment was improper, the present appeal must be dismissed.

In pertinent part, Rule 54(b) provides:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

It is well-established that "Rule 54(b) entries are not to be made routinely or as an accommodation to counsel." *Great American Trading Corp. v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1286 (7th Cir. 1980) (citing *Schaefer v. First National Bank of Lincolnwood*, 465 F.2d 234, 235 (7th Cir. 1972) (per curiam)). As one court has noted, Rule 54(b) "is not to be used without due deliberation." *Solomon v. Aetna Life Insurance Co.*, 782 F.2d 58, 60 (6th Cir. 1986).

In *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980), the Supreme Court reiterated the process a district court must go through in making determinations under Rule 54(b). First, the court must determine if it has reached a "final judgment." In the context of multi-claim litigation, the court's ruling "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.' " *Id.* at 7 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436

(1956)). Similarly, a decision with respect to an individual party in multi-party litigation is final when the claims regarding that party's rights and liabilities have been fully resolved. *See Duckworth v. Franzen*, 780 F.2d 645, 648-49 (7th Cir. 1985).

After determining that it is dealing with a final decision, the district court must then ascertain whether "there is any just reason" for delaying an immediate appeal. *Curtiss-Wright*, 446 U.S. at 8. In making this determination, the court, considering both "judicial administrative interests as well as the equities involved," *id.*, must "weigh the virtues of accelerated judgment against the possible drawbacks of piecemeal review." *Local P-171, Amalgamated Meat Cutters and Butcher Workmen of North America v. Thompson Farms Co.*, 642 F.2d 1065, 1072 (7th Cir. 1981). Factors the court should take into consideration include, among others, "whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals."[3] *Curtiss-Wright*,

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[3] In *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944 (7th Cir. 1980), we noted that the Third Circuit has compiled an extensive, although not all-inclusive, list of factors the district court may consider in determining whether there is any just reason for delaying the entry of final judgment including

> (1) The relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

622 F.2d at 949 (quoting *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975)).

(Footnote continued on following page)

446 U.S. at 8 (footnote omitted). If the district court concludes that there is no just reason for delay, it must make a specific finding to that effect and also make "an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). *See Great American Trading Corp.*, 629 F.2d at 1286 (district courts making Rule 54(b) entries are generally "required to state specific reasons in support of their conclusion that an immediate appeal [is] necessary.").

On appeal, we must review the district court's determination that the final judgment requirements of Rule 54(b) have been met. *See* 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2655, at 40-43 (2d ed. 1983). Pursuant to 28 U.S.C. § 1291, this court has jurisdiction only over final judgments of the district court, and, accordingly, we are required to review *de novo* the district judge's determination on this issue. *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1108 (7th Cir. 1984). If we agree with the district court that its decision is final, we must then determine whether that court abused its discretion in certifying the decision as ready for appeal. *Curtiss-Wright*, 446 U.S. at 8, 10 (noting that the determination of the time of an appeal is appropriately left to the sound discretion of the district court and that "the proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record"); *Bank of Lincolnwood*, 622 F.2d at 948.

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[3] *continued*

Although in *Bank of Lincolnwood* we dealt with a multi-claim situation, we are unable to find any case which holds that the factors the district court should consider in ascertaining whether there is no just reason for delay must, so long as they are relevant, vary depending upon whether the case involves multiple claims or multiple parties or both. Similarly, the commentators apparently draw no such distinction. *See* 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2659 (2d ed. 1983); 6 J. Moore, Moore's Federal Practice ¶ 54.41[3] (2d ed. 1985).

Accordingly, only if we conclude that the district court abused its discretion in ordering the entry of a final judgment should the appeal be dismissed.

In the present case, we agree with the district court that the grant of summary judgment in favor of Albert and D'Amico was a final decision with respect to their liabilities. Our focus, therefore, is on whether the court abused its discretion in certifying this decision for appeal.

The district court found that the claims against Albert and D'Amico were sufficiently separate and distinct to justify the entry of final judgment. Although we concur with much of the court's well-reasoned opinion, we believe that it does not go far enough in analyzing the issue. Early in the litigation of this case, Judge Marshall ruled that USG had standing to bring certain of its claims against the various defendants, including Albert and D'Amico. The issue of standing has never been before this court and is not directly raised by the parties in this appeal. Although we express no opinion regarding the proper resolution of this issue now, we do not believe it appropriate to rule on the question of Albert's and D'Amico's qualified immunity before this court has had a chance to determine if USG had standing to bring its suit in the first place.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). *See Bender v. Williamsport Area School District*, No. 84-773, slip op. at 5-6 (U.S. March 25, 1986) (appellate court must determine whether party seeking to invoke its jurisdiction has "a sufficient stake in the outcome of the litigation to support appellate jurisdiction"). Without the issue of standing properly before us, we are reluctant to ignore it and proceed directly to a consideration of the merits of the defendants' qualified immunity defense. If the issue of standing is decided against USG, resolution of the immunity question would become unnecessary. To avoid resolving an issue that may become irrelevant, we think the proper course is not to

reach the immunity issue now, but rather wait until, if ever, the issue of USG's standing is before this court.[4]

After briefing by the parties, we could, of course, rule solely on the standing issue as it relates to Albert and D'Amico, and then, if necessary, reach the question of immunity. However, because the issue of USG's standing to bring suit against Albert and D'Amico is so interrelated

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[4] Although USG understandably did not raise the issue of its own standing in challenging the defendants' motion under Rule 54(b) in the district court, it did contend that the motion was untimely and that the defendants failed to articulate any substantial reason for certification other than the allegedly inadequate desire to extricate themselves from this litigation. On the other hand, as defendants' counsel conceded at oral argument, standing is an issue which they could challenge on appeal after a decision on all of USG's claims is rendered by the district court. It is also evident that the defendants fully understand the importance of the standing question to a proper resolution of the present appeal.

For example, both Albert and D'Amico rely on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to support their claim of qualified immunity from liability under Count III. In *Harlow* the Supreme Court held that "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. The defendants, apparently implying that the district court's decision on USG's standing is suspect or is at best a novel ruling, note that "until Judge Marshall's ruling in this very lawsuit no court had held that a for profit corporate developer like USG which is not seeking to build housing and is not joined by potential occupants of such housing even has standing to seek damages on any Fair Housing Act claim, let alone that conduct such as Albert's or D'Amico's actually violates any clear rights of parties like USG under the Fair Housing Act." Defendants-Appellees Br. at 34 (citation and footnotes omitted). From this Albert and D'Amico conclude that they are entitled to immunity under *Harlow* since "[a] party [*i.e.*, USG] who has no legal standing to assert a claim has no established rights which have been violated." *Id.* at 34 n.*. The fact that an argument can be raised which ties the issues of standing and immunity together, in and of itself, reinforces our belief that these issues should not be considered separately.

with the issue of USG's standing as against the other defendants, we believe that such a ruling could involve this court in unwarranted piecemeal appellate review.[5] *See Curtiss-Wright*, 446 U.S. at 10; *Solomon*, 782 F.2d at 62 (in determining whether summary judgment in favor of one party in multi-party action was properly certified under Rule 54(b) where district court failed to give reasons for certification, appellate court noted that "judicial economy will best be served by delaying appeal until all the issues can be confronted by this Court in a unified package. This is particularly true where the adjudicated and pending claims are closely related and stem from essentially the same factual allegations."). *See also Arlinghaus*, 543 F.2d at 464 (fact that decision regarding several parties "could have a profound effect on the appeal" of the other parties counsels against entry of judgment with respect to the several parties under Rule 54(b)). We do recognize that both defendants have left their positions with the City of Joliet and it would be convenient, from their perspective, to have the allegations against them resolved as soon as possible. Nonetheless, because the district court's decision leaves open the possibility of our having to rule on the same or very similar issues on

[5] We recognize that in the appropriate circumstances "[a]n order that disposes finally of a claim against one party to the suit can be certified for an immediate appeal under the rule even if identical claims remain pending between the remaining parties." *National Metalcrafters v. McNeil*, 784 F.2d 817, 821 (7th Cir. 1986). *See Banque Paribas v. Hamilton Industries Int'l, Inc.*, 767 F.2d 380, 383 (7th Cir. 1985); *Walker v. Maccabees Mutual Life Ins. Co.*, 753 F.2d 599, 601 (7th Cir. 1985). However, in each case, apart from a final decision, we must determine whether the district court abused its discretion in concluding that "there is no just reason for delay" of the appeal. Fed. R. Civ. P. 54(b). "[T]he mere existence of multiple parties and the dismissal of some do not afford sufficient warrant for entry of final judgment under" Rule 54(b). *Arlinghaus v. Ritenour*, 543 F.2d 461, 463 (2d Cir. 1976) (per curiam). In those cases in which we find that the district court abused its discretion in certifying a decision as appealable, the appeal must be dismissed.

more than one occasion, we are forced to conclude that the court abused its discretion in certifying the grant of summary judgment as appealable under Rule 54(b). USG's appeal is, accordingly, dismissed.[6]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] Although we dismiss the appeal pursuant to Rule 54(b), we express no opinion as to whether the issue of USG's standing as against all of the defendants is one which may be appropriate for some type of interlocutory appeal.

USCA 60054—Midwest Law Printing Co., Inc., Chicago—6-6-86—450

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES GENERAL, INC.,
Plaintiff,

vs.

CITY OF JOLIET, et al.,
Defendants.

No. 75 C 4002

Honorable
Ilana Diamond Rovner

MEMORANDUM OPINION AND ORDER

In 1975, plaintiff United States General, Inc. ("USG") filed a complaint in the District Court of the Northern District of Illinois against defendants, the City of Joliet, the city councilmen, the mayor, the director of the Department of Community Development and the Corporation Counsel, alleging various constitutional, statutory, and common law violations. The action is based on defendants' refusal to rezone or issue building permits to allow USG to construct its plan of low-income housing in Joliet. The case has spawned a multiplicity of motions over the course of the last ten years, including cross motions for summary judgment. In a Memorandum Opinion dated February 10, 1984, Judge Kocoras granted summary judgment in favor of defendants Franklynn B. Albert and James M.P. D'Amico and in favor of defendant City of Joliet upon plaintiff's claim for punitive damages.[1]

[1] There is a great deal of discussion in the briefs regarding the extent of Judge Kocoras' grant of summary judgment in favor of defendants Albert and D'Amico. Plaintiff contends that the court granted summary judgment in favor of the two defendants only as to Count III of the amended complaint, relying on the following language: "Accordingly, both defendants will be dismissed as to Count

(Footnote continued on the following page)

On September 11, 1984, defendants Albert, D'Amico and the City of Joliet filed a motion for entry of an order of final judgment, pursuant to Fed. R. Civ. P. 54 (b), which Judge Kocoras granted on October 31, 1984. USG then filed a motion to vacate the October 31, 1984 Order, on the grounds that it had not been given the opportunity to file a brief in opposition to the certification. On November 14, 1984, Judge Kocoras vacated his Order of October 31, 1984, stating that "it may come out the same way, but I did not give them a chance to address that." Transcript 11/14/84 at pp. 6-7.

Presently before this Court is the fully-briefed motion of Albert, D'Amico, and the City of Joliet, pursuant to Fed. R. Civ. P. 54 (b), for an order directing the entry of a final judgment in accordance with the February 10, 1984 grants of summary judgment. For the reasons stated below, the motion is granted as to defendants Albert and D'Amico, and denied as to the City of Joliet.

(Continued from previous page)

3." Memorandum Opinion at 9. Defendants argue that Albert and D'Amico were granted summary judgment as to all counts against them, relying on the Opinion's conclusion: "For the reasons set forth above, judgment shall be entered in favor of defendants Albert and D'Amico, and plaintiff's demand for punitive damages against the City under Count 3 shall be stricken." Memorandum Opinion at 19.

The Court clarifies the February 10, 1984 Memorandum as follows: Judgment was entered in favor of Defendants D'Amico and Albert on Count III because Defendants established, as a matter of law, good faith immunity. Memorandum Opinion at 9. Defendants D'Amico and Albert were also granted summary judgment in their favor on Counts V and VII (see Memorandum Opinion at 19), although for a different reason. On Counts V and VII, defendants D'Amico and Albert were entitled to summary judgment in their favor because defendants established, as a matter of law, qualified good faith immunity under the Illinois Tort Immunity Act, Ill. Rev. Stat. ch. 85, ¶1-101, *et seq*. Accordingly, summary judgment was entered in defendants D'Amico's and Albert's favor on all claims raised in the complaint.

Discussion

Under Fed. R. Civ. P. 54 (b):

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The Supreme Court has outlined the steps to be followed by the district courts in making determinations under Rule 54 (b). First, the court must determine that there has been a "final judgment" as to an individual claim. Next, the court must find that there is no just reason for delay. *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980), citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956).

In *Curtis-Wright*, the Supreme Court stated that "[i]t is left to the sound judicial discretion of the district court to determine the 'appropriate' time when each final decision in a multiple claims action is ready for appeal." *Id.* at 8, citing *Sears*, 351 U.S. at 437. Proper factors for the court to consider are whether the claims under review are separate from those remaining and whether the nature of the claims already determined is such that the appellate court would not have to decide the same isue more than once even if there were subsequent appeals. *Id.* Further, the Court rejected the notion that the only time a district court may certify a judgment is in the "infrequent harsh case." *Id.* at 10.

Plaintiff argues that this Court is required to deny the motion because it is untimely, under the Seventh Circuit decision in *Schaefer v. First National Bank of Lincolnwood*, 465 F.2d 234 (7th Cir. 1972). The court in *Schaefer* stated: "We hold . . . that as a general rule, it is an abuse of discretion for a district judge to grant a motion for a Rule 54 (b) order when the motion is filed more than 30 days after the entry of the adjudication to which it relates." *Id.* at 236. The circumstances

in *Schaefer*, however, were quite different from the instant case. In *Schaefer*, plaintiffs had improperly appealed a district court order without first obtaining a Rule 54 (b) certification. The appeal was dismissed specifically because of the lack of a Rule 54 (b) determination, and plaintiffs then waited three full months before filing a Rule 54 (b) motion. In light of the unique circumstances of *Schaefer*, the Seventh Circuit pronouncement of the "general rule" was dicta.

Furthermore, since the opinion in *Schaefer*, the Supreme Court in *Curtis-Wright* has re-emphasized the importance of giving substantial deference to the decision of the district court. Although it is true that defendants here waited seven months before filing a Rule 54 (b) motion, this Court finds that timeliness is simply one factor to be noted in weighing the equities, not the absolute restraint on judicial discretion for which plaintiff argues.

Albert and D'Amico

Defendants Albert and D'Amico, formerly director of the City's Department of Community Development and its Corporation Counsel, respectively, request certification of the summary judgment ruling in their favor. As noted in note 1, *supra*, the Memorandum Opinion held that Albert and D'Amico enjoyed a good faith immunity and granted summary judgment in their favor as to all counts against them. Because judgment has been entered as to two of the multiple parties in this case, the Rule 54 (b) motion is proper.

This Court finds that the decided claims against Albert and D'Amico are separate and distinct from those remaining in the case because summary judgment was based on the qualified immunity defense, and no other parties in the case occupied positions similar to those held by these two defendants. Thus, in the event of subsequent appeals, the Court of Appeals would not be required to address identical legal issues.

Further, under Rule 54 (b) "the district court should feel free to consider any factor that seems relevant to a par-

ticular action." *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 949 (7th Cir. 1980), *quoting* 10 C. Wright & A. Miller, *Federal Practice and Procedure* §1659 at 77-78. Judge Kocoras presided over this case for almost four years, and he expended a great deal of time in writing a well-reasoned opinion for the cross-motions for summary judgment. As the district court judge most familiar with the issues and the equities of the case, he initially granted defendants' Rule 54 (b) motion, vacating his order only because of plaintiff's request that it be allowed to brief the issue. In addition, that this case has dragged on for ten years; that it has been handed on through five different judges; and that it involves a very large damages claim for which plaintiff alleges defendants are individually liable, all bolster this Court's determination that there is no just reason for delay.

Therefore, this Court directs the entry of final judgment in favor of defendants Albert and D'Amico.

City of Joliet

The City of Joliet requests certification of the summary judgment ruling that punitive damages are not available against it under Count III. The Memorandum Opinion held only that as to one of the four claims pending against the City of Joliet, compensatory but not punitive damages may be available. The Opinion did not dispose of any complete claim for relief between the parties, only certain damages arising from one of those claims.

The terms of Rule 54 (b) itself imply that certification of such a ruling is improper. Where, as here, plaintiff is suing to vindicate one legal right and alleges several elements of damages, partial summary judgment with respect to only a portion of the relief sought by plaintiff is not a ruling on the entire claim and thus is not certifiable. 10 C. Wright & A. Miller, *Federal Practice and Procedure* §2657 at p. 69; *Acha v. Bearne*, 570 F. Supp. 57 (2d Cir. 1978); *see also United States v. Orr Construction Co.*, 560 F.2d 765, 768 n.3 (7th Cir. 1977) (by implication).

CONCLUSION

The motion of Albert and D'Amico for entry of an order of final judgment pursuant to Fed. R. Civ. P. 54 (b) is granted. The Court denies the motion, pursuant to Fed. R. Civ. P. 54 (b), for entry of an order of final judgment as to the claim for punitive damages against the City of Joliet.

ENTER:

ILANA DIAMOND ROVNER
ILANA DIAMOND ROVNER
UNITED STATES DISTRICT
JUDGE

DATE: March 22, 1985

JUDGMENT IN A CIVIL CASE

United States District Court

DISTRICT

NORTHERN DISTRICT OF ILLINOIS

CASE TITLE

U.S. GENERAL INC.

v.

CITY OF JOLIET et al

DOCKET NUMBER

75 C 4002

NAME OF JUDGE OR MAGISTRATE

ILANA D. ROVNER

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The motion of Albert and D'Amico for entry of an order of final judgment pursuant to Federal Rules of Civil Procedure 54(b) is granted. The Court denies the motion, pursuant to Fed. R. Civ. P. 54(b), for entry of an order of final judgment as to the claim for punitive damages against the City of Joliet.

CLERK

H. STUART CUNNINGHAM

BY) DEPUTY CLERK

J. Smith

DATE

22 March 1985

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable
Charles P. Kocoras

Cause No. 75 C 4002 Date 2-10-84

Title of Cause U.S. General, Inc. *v.* City of Joliet et al

Brief Statement of Motion

Memorandum Opinion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (seperate lists may be appended).

Reserve space below for notations by minute clerk

Enter Memorandum Opinion: Judgment shall be entered in favor of defendants Albert and D'Amico, and plaintiff's demand for punitive damages against the City under Count 3 shall be stricken. In all other respects, the motions for summary judgment are denied. (DRAFT) Cause is placed on the Pending Civil Trial Calendar.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court
until motion has been called.

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Case Number 75 C 4002 Date March 22, 1985

Name of Assigned Judge ROVNER

Case Title UNITED STATES GENERAL INC
-v-
CITY OF JOLIET et al

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows; (2) ☐ [Other docket entry:]

Pursuant to Memorandum Opinion and Order entered this day, enter final judgment pursuant to FRCP 54(b) for Albert and D'Amico. The FRCP 54(b) motion as to the claim for punitive damages against the City of Joliet is denied.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 16, 1986.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge*[*]

No. 85-1687

UNITED STATES GENERAL, INC.,
Plaintiff-Appellant,

vs.

FRANKLYNN B. ALBERT and JAMES M. P. D'AMICO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 C 4002

Ilana D. Rovner
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on June 20, 1986, by defendant-appellee James M. P. D'Amico, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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[*]The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.